No. 251

In the Supreme Court of the United States

October Term, 1955

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SWAN BRUSH, INC. (FORMERLY PLATT)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

CITATIONS

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SEAMPRUFE, INC. (HOLDENVILLE PLANT)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITE STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a wr of certiorari issue to review the decision of th United States Court of Appeals for the Tent Circuit entered on May 4, 1955, denying enforce ment of an order issued by the Board agains Seamprufe, Inc. (Holdenville Plant) (R. 10–2 35–38).

OPINIONS BELOW

The opinion of the court below (App. A, *infr* pp. 7–12) is not yet reported. The findings o fact, conclusions of law, and order of the Na tional Labor Relations Board (R. 10–25, 35–38 are reported at 109 N. L. R. B. 24.

JURISDICTION

The judgment of the court below was entere on May 4, 1955 (App. A, *infra*, p. 13). The juris

diction of this Court is invoked under 28 U. S. C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether an employer violates Section 8 (a) (1) of the National Labor Relations Act by prohibiting nonemployee union organizers from distributing union literature and soliciting union memberships on his plant parking lot during the employees' free time, where it is unreasonably difficult for the union to reach the employees off company property in the immediate vicinity of the plant.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Appendix B, *infra*, p. 14.

STATEMENT

I

The facts

Upon the usual proceedings under Section 10 of the Act, the Board, on July 7, 1954, issued its findings of fact, conclusions of law, and order (R. 10–25, 35–38). The facts, as found by the Board and adopted by the court below, may be summarized as follows:

Respondent's manufacturing plant is located in the outskirts of Holdenville, Oklahoma, a town of approximately 6,000 residents (R. 12; 46–48, 51,

69, 93). Its 200 employees reside in Holdenville, or in surrounding communities up to 30 miles from the plant, and come to work in private automobiles (R. 12; 75, 42–43). Respondent maintains a parking lot on its premises for their use (R. 12; 40, 41, 47, 62–64, 93). Because the plant is in a rural or semirural area and traffic on the adjoining roads is light, there is no stop sign at the intersection of the company driveway with the public highways or on the highways themselves in the vicinity of the plant (R. 13–14; 66, 69). Employees coming to work in the morning normally do not stop at any point near the plant until they reach the parking lot on company property, and likewise leave the parking lot at the close of work without stopping off company property anywhere in the vicinity of the plant (R. 13–14; 50–51, 65–66, 42–43).

Beginning in late 1952, representatives of the International Ladies' Garment Workers' Union, AFL (herein called the Union), visited respondent's parking lot several times to distribute union literature and solicit union memberships as the employees were coming to work (R. 36, n. 4, 14–17; 40–42, 52–53, 54). After the inception of these visits, respondent posted "No Trespassing" and "Private Road" signs on its premises and consistently warned Union representatives that they were trespassing on company property and must leave the premises (R. 14–17; 41–42, 54–59, 62–64, 71–72, 79, 80–85). The Holdenville

City Council likewise enacted an ordinance which forbade going upon private property without the owner's consent under penalty of fine (R. 14, n. 16; 78–79, 41, 53, 62–64, 71–72). Union representatives who thereafter sought to distribute literature or talk to employees on company property near the parking lot during their free time, were ordered off the premises by respondent, at times with company-summoned police aid (R. 15–17; 56–59, 79, 80–85).

II

The Board's conclusions and order

Upon these facts and the entire record, the Board found (R. 35, 18) that respondent prevented the distribution of union literature and solicitation of union memberships by non-employee union representatives in and about its parking lot during the employees' nonworking time. The Board found further (R. 35, 14, 18) that the employees' nonstop method of driving on and off company property made it virtually impossible for union representatives to communicate with the employees off company property in the vicinity of the plant, and that the only effective access to the employees, either upon arrival at or departure from the plant, was in the parking lot area. In the absence of any showing that respondent's rule was necessary in order to maintain plant production or discipline, the Board concluded (R. 35, 18–21) that respondent's prohibition

of access to the parking lot was an unreasonable impediment to the employees' right to self-organization, and hence a violation of Section 8 (a) (1) of the Act. *National Labor Relations Board* v. *LeTourneau Company of Georgia*, 324 U. S. 793, 797–798, 803. The Board rejected (R. 20, 35, n. 2) respondent's contentions that its no-trespassing rule was lawful because it was nondiscriminatory and that the record did not support the conclusion that the Union did not have effective access to the employees away from the plant.

Accordingly, the Board ordered (R. 36–38) respondent to cease and desist from the unfair labor practice found and from any like or related conduct, to rescind its unlawful rule, and to post appropriate notices. The Board's order further provided (R. 36) that respondent may impose reasonable and nondiscriminatory regulations in the interest of plant efficiency and discipline, but not so as to deny union representatives access to the parking lot for the purpose of effecting union distribution or solicitation.

III.

The decision of the court below

The court below (App. A, pp. 7–12) set aside the order of the Board on substantially the same grounds as those relied upon by the Court of Appeals for the Fifth Circuit in *National Labor Relations Board* v. *The Babcock and Wilcox Company*, 222 F. 2d 316, in which the Board is simultaneously

filing a petition for certiorari. Holding that the *LeTourneau* case, *supra*, was inapplicable because the distributors there were employees, the court denied enforcement of the order.

REASONS FOR GRANTING THE WRIT

The decision below is erroneous and presents a square conflict of decisions on a recurring question of importance in the administration of the Act. The question presented in this case is substantially the same as that presented in *National Labor Relations Board* v. *The Babcock and Wilcox Company*, 222 F. 2d 316, in which the Board is simultaneously filing a petition for a writ of certiorari. For the reasons set forth in the petition in that case, to which the Court is respectfully referred, this petition for a writ of certiorari should also be granted.

Respectfully submitted,

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JULY 1955.

APPENDICES

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 4996—November Term, 1954

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SEAMPRUFE, INC. (HOLDENVILLE PLANT), RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

May 4, 1955

Before BRATTON, HUXMAN and MURRAH, *Circuit Judges.*

MURRAH, *Circuit Judge.*

This is a petition to enforce an order of the National Labor Relations Board directing Seamprufe, Inc. to cease and desist from prohibiting the use of its private parking lot and adjacent area by non-employee union organizers for distribution of union literature and solicitation of Seamprufe's employees to union membership during the employees' nonworking hours, on the ground that such prohibition constituted an unfair labor practice under Section 8 (a) (1) of the National Labor Relations Act, as amended. 61 Stat. 136, 29 U. S. C. A. § 151 et seq., 158 (a) (1).

Seamprufe operates a manufacturing plant located on the outskirts of Holdenville, Oklahoma, a town of approximately 6000 residents.

It employs approximately 200 persons on a one-shift basis. Two-thirds of the employees live in Holdenville, and one-third within a radius of from five to thirty miles from the city. None of the employees are represented by a union for collective bargaining purposes.

Late in 1952, representatives of the International Ladies' Garment Workers' Union, AFL, began contacting Seamprufe's employees before and after working hours, on the private parking area provided by Seamprufe for the use of its employees and upon the private sidewalk leading to the rear entrance of the plant. There they greeted the employees and sometimes distributed union literature. After the inception of these visits, Seamprufe posted "No Trespassing" and "Private Road" signs on its premises, and consistently warned the union representatives that they were trespassing on company property and that they must leave the premises. After the Holdenville City Council enacted an ordinance forbidding anyone from going upon private property without the owner's consent under penalty of fine, the union organizers were removed by the city police and arrested for trespassing.

The employees ride to and from work in privately owned automobiles, either singly or in groups. They approach the plant from the east along the public road on the south side of the plant premises. They enter company property driving north on a one-way company-owned road, and park their cars on the company parking facilities at the rear of the plant. After parking their cars the employees walk to the rear en-

trance of the plant on the private sidewalk connecting with the private road.

On leaving the plant after work, the employees proceed by direction from the parking area driving northeasterly on the private road to the public road intersection along the east side of the plant, turn south onto that road and continue thereon to the intersection with the public road bounding the plant premises on the south, where they turn left toward Holdenville. There are no stop signs at either intersection, and the Board affirmed the trial examiner's findings that the employees normally do not stop at any point in the vicinity of the plant except in the parking area because the plant is located in a semirural area and the traffic is light. There was testimony to the effect that at the close of work on a typical day in January 1954, 80 cars containing 225 employees left the parking lot at about a car length apart and at speeds varying from five to twenty-five miles per hour; that approximately ten minutes after cars first began to leave the lot, the entire caravan had departed from the plant area.

Following the rationale of *N. L. R. B.* v. *Le Tourneau Co.*, 324 U. S. 793, and succeeding cases, *N. L. R. B.* v. *Caldwell Furniture Co.*, 199 F. 2d 267 (4th Cir.) cert. denied, 345 U. S. 907; *N. L. R. B.* v. *American Furnace Co.*, 158 F. 2d 376 (7th Cir.); *N. L. R. B.* v. *Illinois Tool Works*, 153 F. 2d 811 (7th Cir.), the Board found that the enforcement of Seamprufe's no-trespass rule was unnecessary to the maintenance of plant production and discipline; and further that the non-stop method of driving to and from the plant area

made it virtually impossible for union representatives to communicate with employees off Seamprufe's property. It therefore concluded that the enforcement of the non-discriminatory rule deprived the employees of their guaranteed right to self-organization constituting an unfair labor practice under Section 8 (a) (1) of the National Labor Relations Act.

The *Le Tourneau* case and those which followed it were concerned with the balancing of the guaranteed right of the employees to self-organization against the correlative right of the employer to maintain plant production and discipline. In arriving at this balance, the court in the *Le Tourneau* case very properly concluded that the right of the employees to distribute union literature and solicit employees upon company property was paramount to a no-solicitation rule in the absence of a showing that the enforcement of the rule was essential to the maintenance of plant production and discipline. And no such showing having been made, the court concluded that the enforcement of the company rule constituted an unfair labor practice.

The rationale of the *Le Tourneau* case was extended to the solicitation of employees by non-employees in a "working area used occasionally by employees and customers" in *Marshall Field & Co.* v. *N. L. R. B.* (7 Cir.) 200 F. 2d 375. But the latter court refused to extend the doctrine to non-employee organizers or solicitors in employees' restaurants and cafeterias in the absence of a showing that by virtue of the isolated character of their employment and residence, the employees were uniquely handicapped in the matter

of self-organization and concerted activity. See *N. L. R. B.* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147.

Calling our attention to the fact that no right of an employee to solicit other employees on company property is involved here, but only the right of a non-employee to go upon company property in violation of a non-discriminatory no-trespass rule, Seamprufe earnestly contends that the rationale of the *Le Tourneau* case is wholly inapplicable to our facts; that our case rather falls within that part of the *Marshall Field* case which denied non-employees access to company property in the absence of a showing of restricted accessibility amounting to a handicap.

As we have seen, the fundamental basis for permitting the solicitation of union membership on company property is to vouchsafe the guaranteed right of self-organization, *N. L. R. B.* v. *Le Tourneau, supra.* When conducted by employees the solicitation amounts to the exercise of a right subject only to the correlative right of the employer to maintain plant production and discipline. An employee on company property exercising the right of self-organization does not violate a company no-trespass rule. *N. L. R. B.* v. *Monarch Tool Co.* (6 Cir.) 210 F. 2d 183. But a non-employee labor organizer who comes upon company property in violation of a non-discriminatory no-trespass rule can justify his presence there only insofar as it bears a cogent relationship to the exercise of the employees' guaranteed right of self-organization.

Here the union which the non-employee solicitors represented was not the bargaining agent

for the employees. Cf. *N. L. R. B.* v. *Monarch Tool Co., supra*. Indeed the employees did not belong to any union, and the solicitors were therefore strangers to the right of self-organization, absent a showing of non-accessibility amounting to a handicap to self-organization.

The Board found special circumstances of inaccessibility. But we do not think that conclusion is legally justified by the facts. True, the union organizers could not contact the employees at the entrance or exit to the company property, but these circumstances did not insulate the employees from the union organizers. Unlike the employees of a lumber or mining camp who live and work on company property isolated from outside contacts, as in *N. L. R. B.* v. *Lake Superior Lumber Corp.*, supra, the employees here lived in or near a small city and were easily accessible to union solicitors. There was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization.

The no-trespass rule was non-discriminatory. There is no showing of antiunion discrimination as in *N. L. R. B.* v. *Stowe Spinning Co.*, 336 U. S. 226 and *Bonwit Teller, Inc.* v. *N. L. R. B.* (2 Cir.) 197 F. 2d 640, and its enforcement did not constitute an unfair labor practice.

The enforcement of the Board's order is therefore denied.

Judgment

One Hundred Seventh Day, November Term, Wednesday, May 4, 1955.

Before Honorable SAM G. BRATTON, Honorable WALTER A. HIXMAN, and Honorable ALFRED P. MURRAH, Circuit Judges:

This cause came on to be heard on the transcript of the record from the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the petition for enforcement of the Board's order be and the same is hereby denied.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

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